PRIVY COUNCIL REPORTS.

[PRIVY COUNCIL]

[Appeal from the Court of Appeal of the Straits Settlements]

LORD MAUGHAM, SIR LANCELOT SANDERSON & SIR SIDNEY ROWLATT.

May 31, 1937.

ESTATE AND TRUST AGENCIES (1927) LTD.....Appellants.

vs.

THE SINGAPORE IMPROVEMENT TRUST .....Respondents.

[PRIVY COUNCIL APPEAL No. 36 of 1936]

Writ of Prohibition—Singapore Improvement Trust—Singapore Improvement Ordinance, 1927, part V.

The powers of the Singapore Improvement Trust under the Singapore Improvement Ordinance are strictly limited by the terms of the Ordinance and since the Ordinance in many respects encroaches on the rights of the subject it must be strictly construed.

In deciding whether, after considering the objections raised against a declaration made under section 57 of the Ordinance condemning a house as being insanitary the declaration should be revoked or submitted to the Governor in Council, the Board must be regarded as exercising quasi-judicial functions.

There is nothing in section 57 which requires more than a fair statement of all matters on which the Board relies and which the owners must be prepared to discuss on the inquiry which must take place before the declaration is submitted to the Governor in Council.

Where the Board applied a wrong and an inadmissible test in making a declaration and deciding to submit it to the Governor in Council, they were acting beyond their powers and the declaration was unenforceable.

That a declaration has been submitted to the Governor in Council is by itself no reason against the issue of a writ of prohibition. A proceeding is none the less a judicial proceeding subject to prohibition or *certiorari* because it is subject to confirmation or approval by some other authority.

Before a prohibition can apply, there must be some act remaining to be done by the Board arising out of the declaration, including any act, not merely ministerial, which may be done by them in carrying into effect any quasi-judicial order that they may have made.

Rex v. *North*, (1927) 1 K.B. 491 referred to.

After the Governor in Council has approved a declaration, the Board have a discretion whether or not to exercise their powers under section 61 of the Ordinance in carrying the declaration into effect and the Board cannot be said to be *functus officio* and a writ of prohibition might issue.

Judgment of Huggard, C.J., reported in (1935) 4 M.L.J. 99 affirmed. Judgment of the Court of Appeal (Thomas, C.J. (F.M.S.) and Terrell, J., Burton, Ag. C.J., dissenting), reported in (1935) 4 M.L.J. 217 *sub nomine In the Matter of an Application for a Writ of Prohibition & In the Matter of the Singapore Improvement Ordinance, 1927*, reversed.

APPEAL to the Privy Council from a majority judgment of the Court of Appeal of the Straits Settlements, Settlement of Singapore, dated the 1st day of August 1935, and reported in 4 M.L.J. 217, dismissing an appeal against an order of Huggard, C.J., dated the 2nd April, 1935, and reported in 4 M.L.J. 99.

In this case the Singapore Improvement Trust took action under s. 57 of Part V of the Singapore Improvement Ordinance (as amended) against all the houses (94 in number) in a large area in the middle of Singapore Town, bounded by Victoria Street, Bugis Street, North Bridge Road and Rochore Road.

In the case of each house in this area the Board made a declaration that the building was insanitary.

Thereupon the Board duly advertised the fact that such declarations had been made and served notices upon the owners affected.

The majority of the owners affected objected in writing to such declarations and appeared on the hearing of the objections by the Board and adduced such evidence as they thought fit.

The Board in each case decided to submit the declarations to the Governor in Council and in fact did so. Thereafter three of the Objectors (who in fact were acting in co-operation with the other objectors) after giving notice to the Board each issued an Originating Summons praying for the issue of writs of prohibition against the Board to prohibit the Board from further proceeding with the reference to the Governor in Council in respect of the said declarations.

All three Originating Summonses were adjourned into open Court for argument and were heard together before Huggard, C.J., who delivered his reserved judgment on the 2nd of April, 1935.

The respondents appealed to the Court of Appeal and the appeal was heard before Burton, Acting C.J., Thomas, C.J. Federated Malay States, and Terrell, J. of whom Thomas, C.J. and Terrell, J. allowed the appeal, Burton, Ag. C.J., dissenting.

The appellants took the matter to the Privy Council.

R. M. Montgomery, K.C., *R. Storry Deans*, and *H. D. Mundell*, for the appellant company, referred to *Hall* v. *Manchester Corporation* (1915), 113 L.T. 465; *R.* v. *Electricity Commissioners, Exp. London Electricity Joint Committee Co. (1920), Ltd.*, (1924) 1 K.B. 171: 130 L.T. 164; *R.* v. *Minister of Health, Exp. Davis*, (1929) 1 K.B. 619; 141 L.T. 6; *R.* v. *Woodhouse*, (1906) 2 K.B. 501; 95 L.T. 367; *London Corpn.* v. *Cox* (1867), L.R. 2 H.L. 239; 36 L.J. Ex. 225; *Serjeant* v. *Dale* (1877), 2 Q.B.D. 558; 37 L.T. 153; *Darby* v. *Cosens* (1787), 1 Term Rep. 552; *Chabot* v. *Morpeth (Lord)* (1848), 15 Q.B. 446; *White* v. *Steele* (1862), 6 L.T. 686; *Jones* v. *Owen* (1848), 5 Dow. & L. 669; 18 L.J.Q.B. 8; 12 L.T. O.S. 153.

Sir Gerald Hurst, K.C., and *H. A. Hill*, for the respondent trust, referred to *Hall* v. *Manchester Corporation* (1915), 113 L.T. 465; *R.* v. *Electricity Commissioners, Exp. London Electricity Joint Committee Co. (1920) Ltd.*, (1924) 1 K.B. 171; 130 L.T. 164; *R.* v. *Chester Licensing JJ., Exp. Bennion*, (1914) 3 K.B. 349; 111 L.T. 575; *Re Clifford & O'Sullivan*, (1921) 2 A.C. 570; 126 L.T. 97; *Errington* v. *Minister of Health*, (1935) 1 K.B. 249; 152 L.T. 154; *R.* v. *Howard, etc., Farnham Licensing JJ.* (1902), 71 L.J.K.B. 754.

The judgment of the Judicial Committee was delivered by—

LORD MAUGHAM.—This is an appeal from an order of the Court of Appeal of the Straits Settlements (Settlement of Singapore) dated 1st August, 1935. By the judgments of the majority of the Court (Thomas C.J., Federated Malay States, and Terrell J. Burton, Acting Chief Justice, dissenting) the appeal of the respondents from the judgment of Sir Walter Clarence Huggard, C.J., dated 2nd April, 1935, was allowed with costs and the order made by him was reversed. In the result a writ of prohibition which had been directed to issue by the trial Judge was set aside.

The appellants, the Estate and Trust Agencies (1927) Limited are the owners of a house known as Municipal No. 543, North Bridge Road, Singapore. The respondents, the Singapore Improvement Trust are a corporate body constituted by the Singapore Improvement Ordinance 1927 and entrusted (by section 4) with the duty of carrying out the provisions of that Ordinance.

The proceedings were commenced by the appellants by summons in the Supreme Court of the Straits Settlements (Settlement of Singapore) asking for the issue of a writ of prohibition directed to the respondents to prohibit them from further proceedings in respect of a declaration, made by the respondents on the 11th December, 1933, that a large block of 97 houses including the appellants' said house were insanitary within the meaning of section 57 of the said Ordinance.

The Singapore Improvement Ordinance, 1927, is divided into parts, Part V (sections 57 to 63 inclusive) deals with Insanitary Buildings and Part VI (sections 64 to 102) deals with Improvement Schemes. The following sections are very material:—

> "57. Whenever it appears to the Board that within its administrative area any building which is used or is intended or is likely to be used as a dwelling place is of such a construction or is in such a condition as to be unfit for human habitation, the Board may by resolution declare such building to be insanitary."

By section 58 (2) (as amended by the Amendment Act, 13 of 1930) it is provided that when a declaration under section 57 has been made the owner of a building in respect of which a declaration has been made may within one month deliver to the Chairman an objection in writing to such declaration: and by section 58 (5) the objector shall be furnished with a statement in writing "of the grounds on which the Board made the declaration."

> "59.—(1) After consideration of all objections the Board may revoke any declaration made under Section 57 or may submit it to the Governor in Council.
>
> "(2) Every declaration submitted under this section to the Governor in Council shall be accompanied by—
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> "(a) the reports, statements or matters upon which the Board acted;
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> "(b) such objections as have been made to the declaration;
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> "(c) any evidence which the objector may have produced before the Board;
>
> "(d) a schedule showing the way in which the Board has dealt with each such objection.
>
> "(3) If no objection has been made to the declaration or if any objection made has been withdrawn, the Governor in Council shall approve the declaration.
>
> "(4) If any objection has been made and not withdrawn the Governor in Council shall inform the objector and the Board of a time and place at which they may be heard.
>
> "(5) At such hearing the Board may appear by one of its officers or by an advocate and solicitor of the Supreme Court and the objector may appear as provided in Section 58 (4).
>
> "(6) Each party may at the discretion of the Governor in Council adduce further evidence.
>
> "(7) After hearing the parties, or such of them as may appear, the Governor in Council may make an Order approving or revoking the declaration."

Section 60 (as amended)—

> "60.—(1) Every order made by the Governor in Council under sub-sections (3) or (7) of section 59 shall be notified. The Board shall thereupon cause a memorandum to be presented to the Registrar of Deeds containing a complete list of all the lands affected by such order, and the Registrar shall note in the register against all such lands the fact that such order has been made.

"(2) Upon such note being made in the register all leases and all rights of occupancy under any tenancy in respect of the building to which the order relates shall forthwith determine without compensation from the Board or from any other person."

"61.—(1) At any time after the registration of an order declaring that a building is insanitary the Board may require the owner or reputed owner thereof by notice in writing to demolish the same within a period to be stated in the notice; provided that the Board shall make such arrangements as it considers necessary for the rehousing of any persons thereby dishoused and shall pay such persons such compensation for disturbance and transport as in its absolute discretion it thinks reasonable."

It should be observed that there is no provision for compensation as regards the demolition.

On the 11th December, 1933, the respondents caused to be served upon the appellants notice of a resolution passed by the respondents on the 22nd November, 1933, under section 57 of the Singapore Improvement Ordinance, 1927, whereby the respondents had declared the said house (among other houses) to be insanitary and by the said notice it was stated that any objection to the said declaration should be delivered to the chairman of the respondents within one week from the service of the said notice.

The said house is a dwelling house and is one of a block of 94 such houses situate in an area bounded by Victoria Street, Bugis Street, Rochore Road and North Bridge Road within the jurisdiction of the respondents and as stated above is known as Municipal No. 543 North Bridge Road. The said resolution applied to all of the said 94 houses.

It may be mentioned that in the year 1928 the respondents had formulated a scheme under Part VI of the said Ordinance for the improvement of that area of Singapore which comprises the said 94 houses. This scheme, however, was deemed to be rejected after objections by certain owners of property affected had been heard by the Governor in Council. One of the main objects of that scheme was to secure the demolition of the houses in the said block of 94 houses including the appellants' house.

On the 27th December, 1933, the appellants by their solicitors, duly objected in writing to the declaration and requested to be supplied by the respondents with a statement in writing of the grounds upon which the respondents had made the said declaration.

On the 3rd January, 1934, the respondents by their secretary, acknowledged the appellants' objection and furnished the appellants with a copy of the report of Dr. Dawson the Acting Municipal Health Officer on the house stating the grounds upon which the house was declared to be insanitary.

The report was in these terms:—

"Insanitary Condition of No. 543 North Bridge Road.

"This is a two storeyed brick and tile building, back to back with Nos. 59 and 60 Malabar Street.

"It is 13 feet in width and 135 feet in depth.

"It has two airwells adjoining a centre party wall of dimensions 12 feet by 8 feet. There is also an open area of dimensions 14½ feet by 10 feet.

"At the rear of the building a brick latrine kitchen and bathroom are situated, a corrugated iron bathroom is situated near the airwell on the first floor.

"The ceiling of the first floor front is 10 feet in height, above which there is an attic under the roof.

"The light is good only in that portion of the building which faces North Bridge Road.

"Ventilation is bad, there being no through current of air and no possibility of obtaining it.

"Drainage is through the house by means of a loose plank covered drain.

"Refuse and nightsoil have to be carried through the house for disposal.

"It is impossible for a water carriage sewage system to be installed."

W. DAWSON,
" Ag. Health Officer."
28.9.33.

On the 21st and 22nd February, 1934, the respondents heard objections to the declaration. The appellants who were represented by Counsel called expert evidence to prove that the appellants' house was not unfit for human habitation. The respondents called no evidence. At the conclusion of the arguments Mr. William Bartley, the chairman of the respondents, announced that consideration of the matter would be postponed until another day.

Without giving any further notice of their intention in that behalf, by letter dated 5th June, 1934 the respondents informed the appellants' solicitors that on the 22nd May, 1934. the decla-

ration had been submitted by the respondents to the Governor in Council in accordance with the provisions of section 59 of the Ordinance. On the following day notice was given by the appellants to the respondents that application would be made for a writ of prohibition against the respondents; and subsequently an originating summons was issued asking for a writ of prohibition prohibiting the respondents from proceeding further in respect of the declaration in question. The grounds mentioned in the summons which was issued pursuant to an order of the Court made on the originating summons, included (amongst others) the ground that the respondents had acted *ultra vires* in making the declaration.

Affidavits were filed both by the appellants and the respondents. In particular Mr. William Bartley, the chairman of the respondents, caused to be filed on their behalf an affidavit sworn by him on the 12th January, 1935, containing some statements which call for serious attention, namely, the following paragraphs:

"4. With reference to paragraph 5 of the said affidavit of the said James William Wotherspoon and the letter from the Secretary of the Board to Messrs. Donaldson and Burkinshaw and Rodyk and Davidson therein set out, I say that the grounds on which the Board declared the said house and premises to be insanitary were not confined to consideration of the report of the Acting Municipal Health Officer, portions whereof are set out in the said affidavit. In addition thereto the Board had visited the said premises and had personal knowledge and experience of the condition thereof. As a result of the reports of Dr. Dawson and of the knowledge and information available to the Board, it appeared to the Board that such premises were in such condition as to be unfit for human habitation.

"9. I ask leave to refer to the Manual on Unfit Houses and Unhealthy Areas issued officially by the Ministry of Health for official use and particularly to Volume I second part, Chapter 5 under heading 'Standards of Fitness' a copy of which is now produced and shown to me marked 'W.B. No. 3.' The first paragraph of chapter 5 of that official publication reads as follows:—

"Conditions to fit houses.

"I. In this chapter a standard of fitness is indicated which should be regarded as the minimum in connection with existing houses. It is not suggested that the full and universal enforcement of the standard is immediately practicable at the present time. On this point reference should be made to what is said in Chapter II, page 7, as to the temporary acceptance in some cases of lower standards. Nor is it suggested that a house which is deficient in respect of one or more of the matters mentioned would necessarily be in a state which would justify the making of a closing order. From this point of view it will be observed that the matters mentioned are of varying importance, those mentioned in the earlier paragraphs being generally the more essential. It will be obvious, of course, that the seriousness of any particular defect may be much greater if that defect is accompanied by others.

"A fit house should be:—

"(1) free from serious dampness.

"(2) satisfactorily lighted and ventilated.

"(3) properly drained and provided with adequate sanitary conveniences and with a sink and suitable arrangements for disposing of slop water, and

"(4) in good general repair;

and should have

"(5) a satisfactory water supply.

"(6) adequate washing accommodation.

"(7) adequate facilities for preparing and cooking food; and

"(8) a well-ventilated store for food.

"10. Accordingly the Board as a whole inspected and examined on the 12th day of March 1934 the said premises and the construction and condition thereof. Upon such inspection the Board took with them the detailed evidence and objections given and raised by the objectors' expert witnesses on behalf of the objectors and gave due consideration to all matters pointed out on behalf of the objectors by such expert witnesses. Such inspection was of great importance and largely influenced the Board in its subsequent decisions upon the objections. Two members of the Board were absent when the Board made the inspection but they subsequently informed the Board that they had each made a visit individually.

"13. In considering the standard of fitness for habitation the Board acted on the standard of fitness laid down in the official Manual of Unfit Houses by the Ministry of Health mentioned in paragraph 9 hereof, except that they eliminated from that standard two conditions namely (1) free from serious dampness and (5) satisfactory water supply."

The application for the writ of prohibition was heard at length before Huggard C.J., and he

delivered his reserved judgment on the 2nd April, 1935.

In a learned and very careful judgment the Chief Justice held that the respondents having a duty to exercise functions of judicial or quasi-judicial character, were amenable to a writ of prohibition and that as there was still something left to be done by them they were not *functus officio*; that the respondents had taken into account matters other than the condition and construction of the appellants' individual house and that the action of the respondents was therefore *ultra vires*; that the respondents had taken into consideration matters outside section 57 and outside the Municipal Health Officer's report and that section 57 applied only to a building unfit in itself by reason of its construction or condition; and he ordered a writ of prohibition to issue. He also expressed his opinion on other points which, in the view their Lordships take, need not be mentioned here.

The appeal of the respondents was heard before the Court of Appeal of the Straits Settlements (Settlement of Singapore) composed of Burton, Acting C.J., Thomas, C.J., Federated Malay States, and Terrell J. of whom Thomas C.J. and Terrell J. allowed the appeal (Burton, Acting C.J. dissenting).

On the appeal, as before the trial Judge, a number of points were argued in addition to those above specifically mentioned. The Judges seem to have agreed that at the hearing of the objections taken by the appellants the respondents were acting quasi-judicially. On the other material points they were not agreed. Thomas C.J. and Terrell J., however, concurred in holding that after the declaration was submitted to the Governor in Council the respondents had no more to do as regards their judicial functions and were a body *functus officio*, with the result that the application for prohibition was made too late, and they also concurred in thinking that the respondents did not take into consideration any extraneous matter or depart from the powers conferred on them by section 57.

On the other hand Burton J., the Acting Chief Justice, held that there had been no proper statement in writing of the grounds for the declaration and that no question of waiver of this objection arose. Further, he held that, since the respondents would have the duty of carrying out the declaration if it were approved by the Governor in Council, it was not too late to issue a writ of prohibition. He was, therefore, in favour of dismissing the appeal. In these circumstances the case comes before their Lordships.

Their Lordships think it right in the first place to state that they have no doubt that the respondents have throughout acted with complete good faith and with an earnest desire to improve the housing accommodation of the Town and Island of Singapore. Their powers, however, are strictly limited by the terms of the Ordinance. Within those powers they can determine questions gravely affecting the property and rights of the inhabitants, but if they step in any degree beyond the limits imposed, any person aggrieved is at liberty to invoke the assistance of the law. The Ordinance in many respects, and in particular in part V, encroaches on the rights of the subject. If a building is demolished as the result of a declaration under section 57 the owner can receive no compensation. There can be no doubt that the Ordinance in this and also in some other parts of it must be strictly construed.

The next point to be dealt with is as to the position occupied by the respondents under sections 57, 58 and 59 of the Ordinance. The procedure under those sections as pointed out by Mr. Justice Terrell may be conveniently divided into three stages, i.e.

First stage.—The consideration of the Municipal Health Officer's report resulting in a declaration under section 57.

Second stage.—The hearing of objection by the owners and the decision of the Board to refer the matter to the Governor in Council.

Third stage.—The consideration of the matter by the Governor in Council at which the parties may be represented and further evidence adduced. This stage results in the Governor in Council making an order either approving or revoking the declaration.

It does not seem necessary to decide whether the respondents were acting in a ministerial or a judicial capacity in the first of these stages; for it is not in dispute that in the second stage, that is, in deciding whether, after considering the objections raised against the declaration being a true and fair representation of the construction and condition of the dwelling (including no doubt the question whether alleged defects are not capable of being easily remedied), the declaration should be revoked or submitted to the Governor in Council, the respondents must be regarded as exercising quasi-judicial functions. A number of English authorities were referred to on this point: but it does not seem necessary to refer to them in detail for the point has been in effect conceded and the Judges in Singapore seem (rightly in the opinion of their Lordships) to have treated it as reasonably clear. Some observations made by Greer L.J. in *Errington* v. *Minister of Health* [1935] I K.B. 249 at p. 259, are pertinent and applicable.

The circumstances of the present case must now be examined. It is at once admitted that

the powers of the respondents are derived entirely from section 57 of the Ordinance. The respondents had to come to the conclusion, of course in good faith, that the building in question, namely the dwelling house, No. 543, North Bridge Road, was of such a construction or was in such a condition as to be unfit for human habitation. The expression as was pointed out by Lord Dunedin in *Hall* v. *Manchester Corporation*, 113 L.T. 465 at p. 468, is a very strong one and vastly different from "not up to modern or model requirements."

If the report of the Health Officer with its ten statements is regarded, as their Lordships think it must be regarded, as the main grounds upon which the respondents made their declaration, there is strong reason for thinking that the statements on the face of them appear to be directed to a complaint other than that of fitness for human habitation. The first five statements relate to construction, and it cannot be contended that applying the standards of housing of Singapore or for that matter, of England, they suggest anything more or worse than a small and perhaps a mean dwelling. In the first statement the words "back to back" are admitted to be inaccurate; they are in fact corrected by the statement that there is an open area 14½ feet by 10 feet at the rear of the house. Then come two statements as to light and as to ventilation. A house with rooms in it which are badly lighted or ill-ventilated cannot be held to be unfit for human habitation without condemning an enormous number of houses, including, if an illustration from London is permissible, many of the older houses of the rich in Mayfair. The truth is, as was in effect pointed out by Lord Dunedin and by Lord Parker in *Hall* v. *Manchester Corporation* 113 L.T. 465 that when a house is stated to be unfit for human habitation it is the whole house that is being so described. In the portion of No. 543 that faces North Bridge Road the light is stated to be good; and the same portion is apparently well ventilated. It cannot be suggested that a room with adequate windows must be ill-ventilated unless it has also a through current of air. The most that is suggested by these two "grounds" is that the back portion of the house may be unhealthy to live in for prolonged periods. The next statement as to drainage must be qualified by stating that it refers to sink-water. If a loose plank covering is insanitary a small expenditure could probably put this right. The last grounds refer to a mere question of convenience; and suggest that the Health Officer would prefer a water carriage system, a very intelligible preference, but one which has little bearing on the question whether human beings cannot occupy the house without any real injury to health.

Their Lordships are not disposed to look upon these so-called grounds as if they were pleadings in an action which could be challenged by a species of demurrer. It seems to them that the Ordinance requires no more than a fair statement of all the matters which the Board relies on and which the proprietors must be prepared to discuss on the inquiry which must take place before the declaration is submitted to the Governor in Council. Their Lordships would therefore have hesitated to act on the strong suspicion which an attentive consideration of the report has aroused in their minds, namely, that the respondents were applying a very different test from that which was open to them under the section; but as it happens the affidavit which the chairman of the respondents made with great fairness and candour has relieved them of any difficulty on this head. It is manifest from the paragraphs of that affidavit which are above set out that the respondents in fact were considering, with slight modifications, a standard suggested by a Ministry of Health in England for a very different purpose. The Manual, which has of course no statutory authority, is concerned merely to indicate the view of the Ministry as to a desirable standard of fitness for houses in England and Wales, presumably in towns, and under conditions which are widely different from those of a great Eastern city. Apart however from this, the Manual itself is not dealing with the standard to be applied in considering whether houses can be held to be unfit for human habitation. It will be noted that there is not one of the matters referred to in the passages from the Manual referred to by Mr. Bartley which is not capable of remedy, and on the other hand that there is not a single reference to those matters which generally render a house unfit for human habitation, such as a structure which is unsafe, a verminous condition of the materials, a pestiferous atmosphere, a state of things dangerous to health, or such a rotten or decayed condition of the building that rebuilding will be cheaper than extensive repair. Their Lordships are not attempting to define the facts or circumstances which render a building unfit for human habitation: they are merely giving reasons for thinking that the defects pointed out in the Manual—defects which in fact exist in country cottages all over the world, and in a vast number of old towns—do not purport to afford a guide on the particular question with which the respondents had to deal. Moreover it should be noted that the effect of a closing order under section 11 of the Housing Act, 1925, is very different from that of a declaration under the Ordinance approved by the Governor in Council; the provisions of section 14 of the Act are not to be found in the Ordinance. Instead of the owner having not

less than four months to remedy the defects of the house, a further hearing before the local authority, with a right of appeal to the Minister, under the Ordinance the Board may require the owner to demolish his house, if the Governor in Council has approved the declaration, without any further hearing and without affording the owner any opportunity of executing the works necessary to render the house fit for human habitation.

To sum up this part of the case, their Lordships have come to the conclusion that the "grounds" on which the respondents made the declaration, as explained by the affidavit of their chairman, were grounds which did not justify the declaration. In other words the respondents were applying a wrong and an inadmissible test in making the declaration and in deciding to submit it to the Governor in Council. They were therefore acting beyond their powers, and the declaration is not enforceable.

On this view of the merits of the case there remains a question of difficulty to be decided, not the less important because it is one of a purely technical character. The originating summons as framed is limited to a claim that a writ of prohibition may issue against the respondents. The Governor in Council is no party to the proceedings and there is no claim founded on *certiorari*. The respondents have thus been enabled to argue that as a board they are *functus officio*, that there is nothing left to be done by them as a quasi-judicial body, nothing on which the writ of prohibition could operate, and that the application, not having been made before the declaration was submitted to the Governor in Council, is too late. It is not in dispute that the fact that the declaration has been submitted to the Governor in Council is in itself no reason against the issue of the writ. A proceeding is none the less a judicial proceeding subject to prohibition or *certiorari* because it is subject to confirmation or approval by some other authority. (See *Rex* v. *Electricity Commissioners* [1924] I K.B. 171 and cases there referred to).

On the other hand there must remain something to which prohibition can apply, some act which the respondents if not prohibited may do in excess of their jurisdiction, including any act, not merely ministerial, which may be done by them in carrying into effect any quasi-judicial order which they have wrongly made. Their Lordships do not doubt the correctness of the view expressed by R. S. Wright J. in *In re London Scottish Permanent Building Society* (63 L.J. Q.B. 112 at p. 113), namely, that "an application for prohibition is never too late as long as there is something left for it to operate upon." In the case of *Rex* v. *North* ([1927] I K.B. 491, Scrutton, L.J., after expressly approving this dictum as that of a Judge who had great familiarity with this subject, remarked, "when the sentence is unexecuted a statement of intention to execute it may be followed by a writ of prohibition, however long a time may have elapsed since the original sentence was pronounced." It is not immaterial in this connection to observe, since the writ of prohibition is a matter of discretion, that the respondents gave the appellants no opportunity of applying for prohibition or *certiorari* before they sent the declaration to the Governor in Council.

In the present case there are three duties with which the respondents may still be charged. In the first place under section 59 (5) they may appear at the hearing before the Governor in Council by one of their officers or by an advocate and solicitor of the Supreme Court. In the second place, if the declaration is approved, the respondents under section 60 (I) must cause the order approving the declaration to be presented for registration under Ordinance No. 148. In the third place, at any time after the registration of the order, "the Board may require the owner . . . . by notice in writing to demolish [the building] within a period to be stated in the notice."

Their Lordships are not disposed to think that the Court in its discretion would order prohibition to issue in relation to the first matter. The Governor in Council could proceed with his inquiry without the assistance of the respondents, and the prohibition as to that appearance might be of a futile character. There might also be serious difficulties in ordering the writ to issue merely in regard to the registration. Their Lordships do not think it necessary to express a final opinion as to this; for, in their view, the functions which the respondents have to perform under section 61 are free from those difficulties. Plainly the power which they have under that section is of a discretionary character; and the Governor in Council has nothing to do with the exercise of that discretion. Nor will the respondents under section 61 be carrying out the order of the Governor in Council, which can do no more than approve the declaration. There is no reason for thinking that the actions of the respondents under that section are to be treated as altogether severed from their actions under section 57. The more correct view would seem to be that in requiring the demolition they would in truth be carrying into effect their original declaration, which indeed required the approval of an independent authority, but which, that approval having been obtained, was left to the respondents to carry out according to their discretion. It must not be forgotten in considering the technical aspect of the case that, on the conclusion at which their Lordships arrived, the declaration

was *ultra vires*, and that if the respondents were to attempt to exercise their powers under section 61 they would be relying on an order which, if challenged in time by suitable proceedings, could not have been made.

On the whole and on careful consideration of the four learned judgments and some able arguments, their Lordships must agree with the conclusions of the Chief Justice of the Straits Settlements and of Acting Chief Justice Burton. The order of the former must be restored and the appeal must be allowed with costs here and below.

Their Lordships will humbly advise His Majesty accordingly.

Appeal Allowed.

Solicitors for the Appellants—*Whites & Co.*

Solicitors for the Respondents—*Peacock & Goddard.*